



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

October 19, 1976

Murphy
BRUCE E. BABBITT
ATTORNEY GENERAL

R75-721

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Gary D. Hulshoff, Ph.D
Assistant Director for Medical Assistance
1740 West Adams
Phoenix, Arizona 85007

Dear Dr. Hulshoff:

You have asked the following questions concerning the public's right to inspect bid proposals received by the Department of Health Services in response to requests for proposals issued under A.R.S. §§ 41-1051 et seq:

1. Are proposals from private bidders submitted pursuant to A.R.S. § 41-1051 "public records" within the meaning of A.R.S. §§ 39-121 and 39-121.01?
2. If these proposals are "public records", do they become public records when submitted, after the contract has been awarded, after the contract has been signed or at some other time?
3. Such proposals often reveal facts about the bidder's business or technical operations which it would hesitate to make available to competitors. If the bidder submits its bid with the express statement that certain information in the bid is a "trade secret" or certain information is marked "confidential", "does this affect the bid's status as a "public record"?
4. As you are aware, most of the funds used to finance Medicaid are federal funds. Does this predominance of federal funding allow a



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bidder to claim the protection
afforded bidders on federal projects
[e.g. the trade secrets exception
under the Freedom of Information
Act, 5 U.S.C. § 552(b)(4)]?

A.R.S. §§ 41-1051 et seq establish mandatory procedures to be followed by state budget units when contracting for outside professional services. As part of the required procedures the budget unit desiring to obtain professional services must provide to interested parties a written "request for proposals" describing the professional service sought by the budget unit and the time and place for prospective bidders to submit proposals to provide the desired service. Although not expressly so providing, A.R.S. §§ 41-1051 et seq. contemplate that the budget unit may contract with only those persons who have submitted proposals in conformance with the "request for proposals." See A.R.S. §§ 41-1051, 41-1055. You have inquired whether these proposals are "public records" within the meaning of A.R.S. §§ 39-121 and 39-121.01.

A.R.S. § 39-121 has remained unchanged since its enactment in 1901 and provides as follows:

Public records and other matters in the
office of any officer at all times during
office hours shall be open to inspection
by any person.

This section requires that both "public records" and "other matters" be made available for public inspection. For a detailed discussion of what types of records constitute "public records" and "other matters", see Department of Law Opinion R75-781⁷⁶⁻⁴³, a copy of which is enclosed for your information. The applicable law, discussed in that opinion makes clear that although bid proposals may not fall within the strict definition of "public records" established by the Arizona Supreme Court in Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952), they do constitute "other matters" and are therefore subject to the public disclosure requirements of A.R.S. § 39-121.

It must be remembered, however, that the public's right to inspect public records and other matters is not without qualification. Information contained in these records may be treated as confidential where a statute specifically declares them to be confidential or the material in the record is of such a nature that it would be against the best interests of the

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State to permit disclosure. See Mathews v. Pyle, 75 Ariz. at 80, 251 P.2d at 896. This "best interests" determination is, of course, made in the first instance by the agency having custody of the record. Any doubts should be resolved in favor of public disclosure. The agency should keep in mind that any decision denying access to a record is subject to judicial review under A.R.S. § 39-121.02, and that the reviewing court may assess the agency with court costs and attorneys fees and resulting damages for a wrongful denial.

With respect to your second question, it is our opinion that the proposal should be treated as a public record immediately following the deadline for submitting the proposals. Allowing prospective bidders to see the contents of other proposals when received by the department and prior to the deadline for submitting proposals would give them an unfair advantage in subsequently preparing and submitting their proposals. This unfair advantage would tend to deter these prospective bidders from proposing prices lower than necessary to under bid those prices offered in proposals already submitted to the department. Under these circumstances we believe that the "best interests of the state" test set forth in Mathews v. Pyle, supra, requires that such proposals not be disclosed to the public until immediately after the deadline for submitting proposals.

With respect to your third question it should be noted that Arizona's public records laws do not expressly provide an exemption for "trade secrets". However, it may be appropriate in limited situations for the Department under the forgoing "best interests of the state" test to determine that portions of the proposals submitted to the Department must be treated as confidential. Such a determination might be made where, for example, failure to render protection from disclosure would result in a complete absence of competitive bidding. Nevertheless the Department cannot make this finding merely on the basis of the bidder's designation of certain material as a trade secret or otherwise confidential.

A person who sends a communication to a public office, relative to the public business, cannot make his communication private and confidential simply by labeling as such. Kauffman Assoc. v. Levy, 345 N.Y.S.2d 836, 842 (1973).

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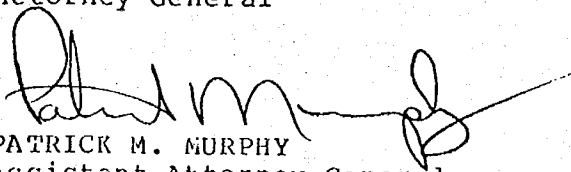
Accordingly, the answer to your third question is no. However, it may be advisable to notify prospective bidders of the fact that these bids may be subject to disclosure subsequent to the deadline for submission of bids.

Likewise, the answer to your fourth questions is no. The Federal Freedom of Information Act (5 U.S.C. §§ 552 et seq.) is not applicable to state agencies and the Department, therefore, cannot avail itself of an exception contained in this federal Act.

If you have any further questions concerning these matters please do not hesitate to contact our office.

Very truly yours,

BRUCE E. BABBITT
Attorney General



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